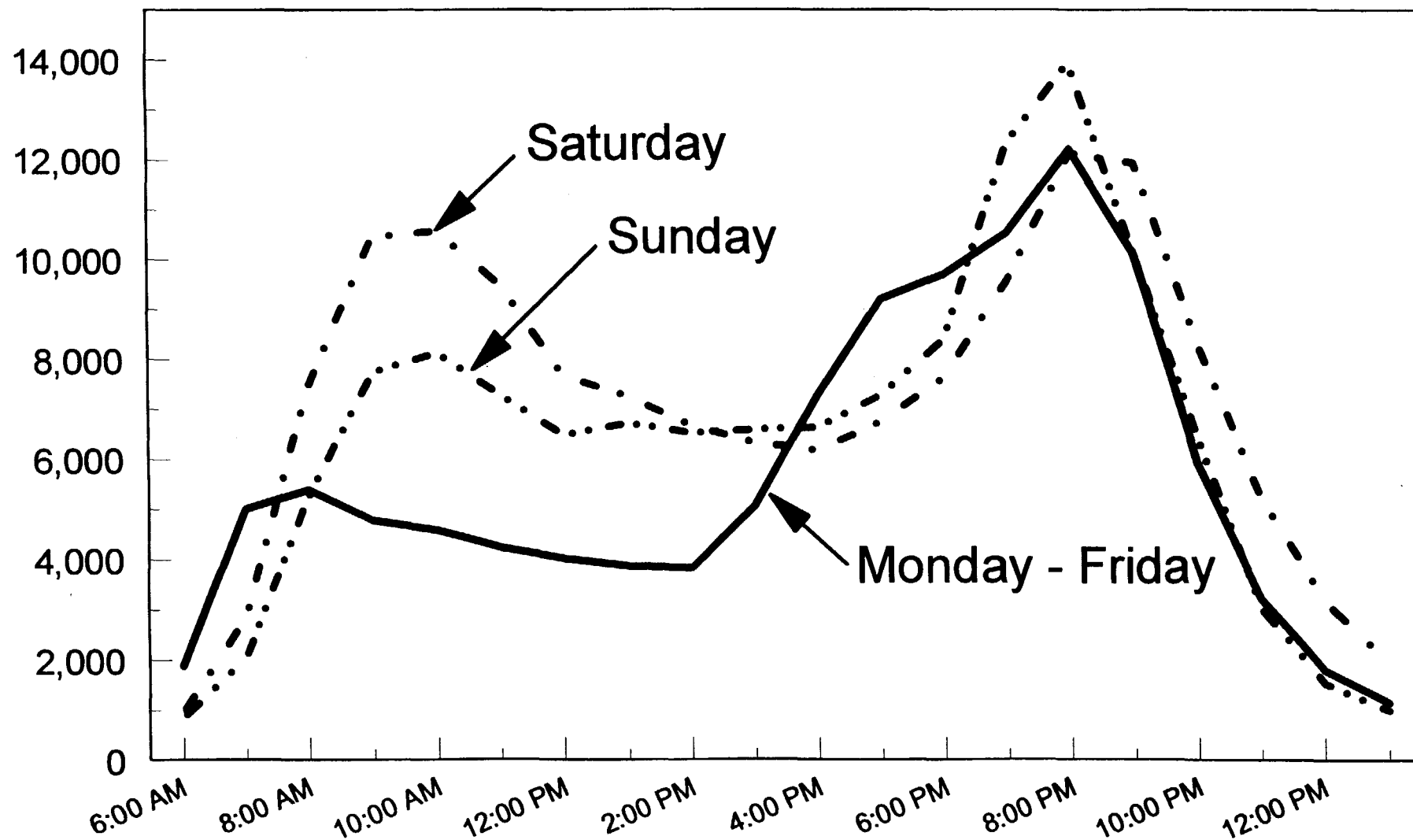


Kids Television Viewing

Children 2 - 11 Watching Television

Figures are in thousands



Source: Nielsen Peplemeters, 4Q'94

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
Policies and Rules Concerning)	
Children's Television Programming)	MM Docket 93-48
)	
)	
Revision of Programming Policies)	
for Television Broadcast Stations)	
)	

**STATEMENT OF RODNEY A. SMOLLA
IN SUPPORT OF THE COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

Respectfully Submitted,

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Qualifications

I am the Arthur B. Hanson Professor of Law, and Director of the Institute of Bill of Rights Law, at the College of William and Mary, Marshall-Wythe School of Law, and a Senior Fellow of The Annenberg Washington Program in Communications Policy Studies of Northwestern University. I have written extensively in the field of constitutional law, particularly in areas of civil rights and civil liberties, and the First Amendment. My books

in these fields include: *Smolla and Nimmer on Freedom of Speech* (Matthew Bender Pub. Co. 1994); *Free Speech in an Open Society* (Alfred A. Knopf 1992) (received the 1992 William O. Douglas Prize for the Most Distinguished Monograph on Freedom of Expression); *Constitutional Law, Structure and Rights in Our Federal System* (with Daan Braveman and William Banks, Matthew Bender Pub. Co., 2nd ed. 1991); *Federal Civil Rights Acts* (Clark Boardman Callaghan Pub. Co., 3rd ed. 1994); *Jerry Falwell v. Larry Flynt: The First Amendment on Trial* (St. Martin's Press, 1988); *Suing the Press: Libel, the Media, and Power* (Oxford University Press, 1986) (received the ABA Gavel Award Certificate of Merit); *Law of Defamation* (Clark Boardman Callaghan Pub. Co. 1986, with annual supplements); and *A Year in the Life of the Supreme Court* (R. Smolla, ed., Duke University Press 1995).

Statement

I. Introduction

The Commission's *Notice of Proposed Rulemaking*¹ proposes to take one of three courses of action: (1) the monitoring of broadcasted programming specifically designed to serve the educational needs of children to determine if there is a significant increase in such programming; (2) establishment of a safe harbor quantitative processing guideline for

¹ MM Docket No. 93-48.

children's educational programming; or (3) promulgation of a programming standard setting forth a specified average number of hours for children's educational programming. These alternatives are in turn anchored by a proposed definition of "core" educational programming setting forth requirements for the design, purpose, hours, scheduling regularity, programming length, and identifying information that such programming must contain.

There are no First Amendment objections to the monitoring alternative, or to the Commission's use of its persuasive powers, to encourage broadcasters to meet the worthy objectives of the Children's Television Act of 1990.² The proposed quantitative processing guideline, the proposed programming standard, and the proposed definition of core educational programming, however, violate established First Amendment principles and exceed the Commission's constitutional authority. These constitutional concerns are addressed in this Statement.³

II. Alleged Economic Market Dysfunction is Not a Permissible Basis for Regulation

The Commission's proposals are driven by the judgment that economic market forces operate to deter broadcasters from providing what the Commission believes is sufficient educational programming for children, and therefore broadcasters must be forced more

² Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a-303b, 393a, 394 (Supp. III 1991)).

³ For simplicity the quantitative processing guideline, programming standard, and definition of core programming are referred to generically throughout this Statement as the "Commission's proposals."

directly through regulation to provide additional programming.⁴ To the extent that the Commission's proposals are motivated by the judgment that "you can't . . . get this kind of programming unless you oblige it," they are predicated on a governmental interest that, as a matter of law, is not a permissible basis for FCC regulation.

"At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445, 2458 (1994). This is not some featherweight precept floating on the periphery of First Amendment doctrine, but a core constitutional principle; government action "that requires the utterance of a particular message favored by the Government, contravenes this essential right." *Id.* Indeed, in *Turner Broadcasting* the Supreme Court sternly instructed that such laws "pose the *inherent* risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or *manipulate the public debate through coercion rather than persuasion.*" *Id.* at 2458 (emphasis added). Admittedly, the Commission's proposals are not an attempt at censorship in the traditional sense; the Commission clearly is not attempting to "suppress unpopular ideas or information." But the Commission *is* quite unabashedly

⁴ This rationale has been forcefully advanced as the predicate for the current Commission proposals by Chairman Reed Hundt in numerous recent speeches and interviews. See Don Oldenburg, *Tuning in the Future of Kids' TV*, The Washington Post, September 12, 1995, at B5 col. 2 ("'You can't expect in the normal workings of the marketplace to get this kind of programming unless you oblige it,' says FCC Chairman Reed Hundt, who has championed the proposal for new rules that would require commercial networks to schedule a minimum of high-quality and innovative children's educational shows and is actively seeking the public's support for it.").

considering strategies that “manipulate the public debate through coercion rather than persuasion.” Under the First Amendment, this is something the Commission may not do.

First Amendment principles do not permit the Commission to exercise at-large authority to regulate the programming of broadcasters for the purpose of correcting perceived deficiencies in the programming generated by broadcasters within the environment of the competitive commercial marketplace. The Supreme Court has repeatedly emphasized that the regime of *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367 (1969), does not grant the Commission carte blanche authority over the programming choices of broadcasters. “Government regulation over the content of broadcast programming must be narrow,” and “broadcast licensees must retain abundant discretion over programming choices.” *Turner Broadcasting, Inc. v. FCC*, *supra*, 114 S.Ct. at 2464; citing *FCC v. League of Women Voters of California*, 468 U.S. 364, 378-80 (1984); *Columbia Broadcasting System, Inc., v. Democratic National Committee*, 412 U.S. 94, 126 (1973).

Pointedly, the Supreme Court in *Turner Broadcasting* specifically rejected the “market dysfunction” justification for the regulation of broadcasters. In direct response to the Government’s argument in *Turner* that the foundations for the *Red Lion* standard of review are not the physical limitations of the electro-magnetic spectrum but rather the “market dysfunction” that allegedly characterizes the broadcast market, the Supreme Court sharply replied that “the special physical characteristics of broadcast transmissions, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence.” *Turner Broadcasting System, Inc. v. FCC*, *supra*, 114 S.Ct. at 2457, citing

FCC v. League of Women Voters, *supra*, 468 U.S. at 377; *FCC v. National Citizens Comm. For Broadcasting*, 436 U.S. 775, 799 (1978); *Red Lion Broadcasting Company. v. FCC*, *supra*, 395 U.S. at 390. In short, the Commission's entire agenda in these proceedings is grounded in a purpose that the Constitution does not allow it to entertain.

III. The Proposed Processing Guidelines, Programming Standards, and Definition of Core Educational Programming Violate the First Amendment

A. The Proposals Intrude on the Constitutionally Protected Independence of Broadcasters

If perceived market dysfunction is not a permissible basis for tightened content-based regulation of children's broadcasting, the question becomes whether the proposals are otherwise justifiable under the First Amendment standards for broadcasting regulation currently in place. The answer, simply, is "no." The proposed safe harbor quantitative processing guideline, the alternatively proposed programming standard, and certain critical elements of the proposed definition of educational programming, all operate to dictate, either in fact or in practice, the programming choices of broadcasters. The description of what shall constitute "core" educational programming intrudes on the First Amendment freedom of broadcasters in an unprecedented manner, by dictating the purpose, hours, scheduling regularity, programming length, and identifying information that such programming must contain to satisfy regulatory requirements. For First Amendment purposes, the imposition of a minimum number of hours of specifically defined programming violates established constitutional norms whether the regulatory mechanism is a safe harbor quantitative

processing guideline or a flat-out rule; in constitutional terms, these two options present a distinction without a difference, for in either case the government is effectively imposing affirmative obligations on broadcasters to air programs falling within a definition established by the government within time parameters established by the government for a minimum number of hours established by the government. The Commission's proposals are different in kind from the forms of content-based regulation of broadcasting previously approved by the Supreme Court under the First Amendment; indeed, the proposals fall squarely within the description of the type of regulation that the Court has repeatedly insisted the FCC may not undertake.⁵

The current First Amendment standard governing broadcast regulation, as distilled in *FCC v. League of Women Voters, supra*, 468 U.S. 363 (1984), is that a regulation will be

⁵ I should stress at the outset of this Statement that it is premised on my objective evaluation of prevailing First Amendment standards as they exist today, and thus assumes that the spectrum scarcity rationale of *Red Lion* remains good law until it is overruled. It must be pointed out, however, that it is not at all clear that the Supreme Court would, if presented with an appropriate case in which to revisit the matter, continue to adhere to the spectrum scarcity rationale of *Red Lion*. See, e.g. *FCC v. League of Women Voters, supra*, 468 U.S. at 376-77 n. 11 (noting critiques of the doctrine but declining to revisit it absent a signal from Congress or the Commission that technological developments require its reconsideration); *Turner Broadcasting, Inc. v. FCC, supra*, 114 S.Ct. at 2457 (observing that "courts and commentators have criticized the scarcity rationale since its inception" but declining to address the issue). In the view of this commentator, for reasons that need not be canvassed here, the spectrum scarcity theory of *Red Lion* ultimately should and will be rejected. The argument advanced in this Statement, assumes, however, that *Red Lion* remains the governing standard; the critical point is that even under *Red Lion*, the Commission's proposals go well beyond what is permitted. And as noted subsequently in this Statement, there are additional reasons to question the efficacy of the spectrum scarcity theory in the context of current children's programming, for even if spectrum scarcity remains a legally viable theory in the abstract, it fails as applied to the record the Commission has thus far developed in these proceedings.

upheld only when “the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues.” *Id.* at 381. In applying this standard, a standard grounded *exclusively* in the spectrum scarcity rationale emanating from *Red Lion*, the Supreme Court has *never* countenanced government regulations that impose specifically defined affirmative programming requirements on broadcasters. To the contrary, the First Amendment “window” opened by *Red Lion* and its progeny has been limited to regulations aimed narrowly at ensuring equality of access in public debate and the channeling of indecent programming.⁶ And no matter how vigorously the Commission may disclaim any intent to become a federal “Office of the Censor,” the inevitable regulatory response of specific program requirements will be program-by-program review of the content of children’s offerings aired by broadcasters, to determine if those programs meet the definition imposed by the Commission. Specific programming requirements are senseless without specific regulatory enforcement. Such program-by-program review would mark a fundamental shift in the philosophy governing broadcast regulation at odds with statutory limitations, prior Commission practice, and core First

⁶ The Commission wisely abandoned its prior use of programming guidelines in 1984. See Report and Order, *The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, MM Docket. No. 83-670, 98 F.C.C.2d 1076 (1984). Those guidelines, far more general than the standards the Commission is currently flirting with for children’s programming, were themselves of dubious constitutional status, and were dropped by the Commission because, among other reasons, the Commission was convinced that market forces would adequately ensure the presentation of programming that responds to community needs, and out of concern that the guidelines, general as they were, still tended to impinge unnecessarily on the editorial prerogatives of broadcasters. *Id.* at 1077-85.

Amendment principles.

The spectrum scarcity rationale upon which First Amendment doctrine governing the content-based regulation of broadcasting is currently grounded does not provide the Commission with plenary power to impose its views of wise social policy on the programming choices of broadcasters. To the contrary, the Supreme Court has drawn a sharp distinction between regulations that are implemented to ensure reasonable balance and access equity in the presentation of views on issues of public concern or the political process, on the one hand, and regulations that intrude on the independence and discretion of broadcasters, particularly in the selection of actual programming sources, on the other. Thus the Court has observed that “although the Government’s interest in ensuring balanced coverage of public issues is plainly both important and substantial, we have, at the same time, made clear that broadcasters are engaged in a vital and independent form of communicative activity.” *FCC v. League of Women Voters, supra*, 468 U.S. at 378.

Because of spectrum scarcity, the Supreme Court has thus in the past instructed, the Commission may require a degree of balance and access in the presentation of diverse views on public controversies and elections. But spectrum scarcity does not justify turning broadcasters into common carriers, or subjecting broadcasters to specific governmental mandates as to particular types of programming. In those cases in which the Court has permitted regulation under the balance and access rationales, it has heavily emphasized the limited scope of such incursions. When the Court sustained a right of access for federal candidates, for example, it noted that this was a “*limited* right of ‘reasonable access.’” *CBS,*

Inc., v. FCC, 453 U.S. 367, 396 (1981) (emphasis in original), a right that did “not impair the discretion of broadcasters to present their views on any issue or *to carry any particular type of programming.*” *Id.* at 397 (emphasis added).

The Court has referred to this tension between the obligations of broadcasters and their independence as members of a free press in our constitutional system as a “tightrope” calling for “delicate balancing”:

This role of the Government as an “overseer” and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic “free agent” call for a delicate balancing of competing interests. The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a “tightrope” to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act.

Columbia Broadcasting System, Inc., v. Democratic National Committee, 412 U.S. 94, 117 (1973). In these proposals the Commission is in danger of losing its balance and falling off the tightrope.

B. The Proposals Flatly Contradict the Jurisprudence of *Turner Broadcasting*

The migration from the Commission’s historic practices contemplated in the Commission’s proposals is of constitutional dimension. This fact is placed in raised relief by the Supreme Court’s most recent elaboration on the Commission’s powers in *Turner*

Broadcasting. Bluntly, there are crucial passages in *Turner Broadcasting* that are flatly irreconcilable with many of the options set forth in the Commission's proposals. It will not do to dismiss the learning of *Turner Broadcasting* as a "cable case" inapposite to the Commission's present broadcast proposals. *Turner* is the Supreme Court's careful articulation of the interface between the cable and broadcast media; the Court's holding in *Turner* regarding must-carry requirements was explicitly grounded in the Court's explication of the constitutional and statutory limits binding on the Commission with regard to its regulation of *broadcasting*.

In the critical passage of the *Turner Broadcasting* opinion, the Court began with the concession that broadcast programming, unlike cable programming, is subject "to certain *limited* content restraints imposed by statute and regulation." *Turner Broadcasting, Inc. v. FCC, supra*, 114 S.Ct. at 2462 (emphasis supplied). In a footnote the Court then cited, as its first illustration, the Children's Television Act, which it characterized as: "directing FCC to consider extent to which license renewal applicant has 'served the educational and informational needs of children.'" *Id.* at 2462, n. 7. It is worth underscoring that by this characterization, the Court clearly understood the Commission's statutory authority as *limited* to consideration of the extent to which licensees have satisfied this obligation as part of the license renewal process. Far more importantly, however, the Court then went on to explain, in quite sweeping terms, the jurisprudential principles that constrain the Commission's power to regulate the content of broadcasting. In this decisive segment of its opinion the Court observed that the argument against must-carry "exaggerates the extent to

which the FCC is permitted to intrude into matters affecting the content of broadcast programming.” *Id.* at 2463. This exaggerated characterization of the FCC’s authority, the Court explained, failed to take into account the doctrine that the FCC may not prescribe *any particular type of programming* that must be offered by broadcast stations. The Commission may in license renewal inquire as to what licensees have done to meet their statutory obligations, but it may not through rule impose programming requirements:

In particular, the FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although “the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.”

Id. at 2463, quoting *Network Programming Inquiry, Report and Statement of Policy*, 25 Fed.Reg. 7293 (1960).

Not content to let matters rest there, the Court then made its point a second time, using as its example the limitations on the Commission’s authority over noncommercial educational stations. The Court’s discussion on this issue is particularly relevant to the current proceedings, for the Court was parsing the statutory and constitutional confines of the Commission’s authority to define *educational* programming:

What is important for present purposes, however, is that

noncommercial licensees are not required by statute or regulation to carry any specific quantity of “educational” programming or any particular “educational” programs. Noncommercial licensees, like their commercial counterparts, need only adhere to the general requirements that their programming serve “the public interest, convenience or necessity.”

Turner Broadcasting, Inc. v. FCC, supra, 114 S.Ct. at 2463, quoting *En Banc Programming Inquiry*, 44 F.C.C.2d 2303, 2312 (1960).

In these passages the Court was thus underscoring a *long-standing* limitation, a limitation that Congress, for its part, has understood and endorsed, and more importantly, that Congress, the Commission, and the courts have all previously understood as undergirded by limitations in the First Amendment itself.⁷ Indeed, in describing these limits on FCC authority, the Court in *Turner Broadcasting* quoted liberally from the Commission’s own prior acknowledgments that more intrusive regulation would violate First Amendment principles. *Turner Broadcasting, Inc. v. FCC, supra*, 114 S.Ct. at 2463 (“The FCC is well aware of the limited nature of its jurisdiction, having acknowledged that it ‘has no authority and, in fact, is barred by the First Amendment and [§ 326] from interfering with the free exercise of journalistic judgment.’”) quoting *Hubbard Broadcasting, Inc.*, 48 F.C.C.2d 517,

⁷ The importance of congressional intent, and how it plays into application of First Amendment standards, is discussed in detail in Part IV of this Statement, *infra*.

520 (1974); *Turner Broadcasting, Inc. v. FCC*, *supra*, 114 S.Ct. At 2463 (“The FCC itself has recognized that “a more rigorous standard for public stations would come unnecessarily close to impinging on First Amendment rights and would run the collateral risk of shifting the creativity and innovative potential of those stations.”) *quoting Public Broadcasting*, 98 F.C.C.2d 746, 751 (1982).

C. The Proposals Offend the First Amendment Principle of Speaker Autonomy

In a recent speech Chairman Hundt suggested that specific programming standards would actually *enhance* First Amendment values, citing the general First Amendment doctrine favoring precise over vague standards. *See* Chairman Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, Conference for the Second Century of the University of Pittsburgh School of Law, September 21, 1995. This argument, however, is sleight of hand, for it invokes the precision principle entirely out of context, and in so doing turns existing First Amendment doctrine upside down. When government is engaging in *negative* regulation, proscribing certain speech and establishing penalties for its utterance, doctrines such as “overbreadth” and “vagueness” *do* work to require precision in drafting. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (overbreadth); *Stromberg v. California*, 283 U.S. 359 (1931) (vagueness). Similarly, laws that presume to restrict speech must be precisely tailored, sweeping no more broadly than necessary to effectuate the government’s purposes. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989). But these First Amendment axioms have never been applied in the opposite direction: there is simply no such thing as a requirement that government act precisely when ordering speakers

what to say, because the very notion of ordering speakers to speak to suit the government's purposes is antithetical to free speech. The premise of the Chairman's remarks is thus profoundly flawed; the precision principle, designed to protect speakers from government overreaching, cannot be invoked to aid and abet it. The Supreme Court's many ringing pronouncements that the government may not impose obligations on speakers to speak certain messages pleasing to the government are not magically mooted merely because the government is careful to be precise in its marching orders.

Indeed, when the government is enforcing affirmative obligations to speak, the greater the specificity, the greater the offense. This independence and autonomy of speakers under our constitutional system to decide for themselves what to say and what not to say is a universal theme in First Amendment jurisprudence, cutting across various forms of media and subject matter. *See, e.g., Pacific Gas & Electric Company v. Public Utilities Commission of California*, 475 U.S. 1, 11 (1986) (commercial speech case striking down forced inclusion of messages of others, noting that “*all* speech inherently involves choices so what to say and what to leave unsaid”) (emphasis in original); *McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1511, 1516, 1519 (1995) (striking down ban on anonymous campaign literature, emphasizing First Amendment right of speakers to make their own “decisions concerning omissions or additions to the content of a publication,” and to choose for themselves what to “include or exclude”); *Turner Broadcasting, Inc. v. FCC*, *supra*, 114 S.Ct. at 2463 (noting that “the FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming”); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977)

(“However, where the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.”).

Most recently, in *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 115 S.Ct. 2338 (1995), the Supreme Court, drawing heavily on *Turner Broadcasting*, spoke eloquently of the centrality of this autonomy principle in our First Amendment tradition:

Our tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the State based on the content of what he says. . . . The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Id. at 2350 (internal citations omitted).⁸

To elaborate on this classic “soapbox” image, the spectrum scarcity rationale endorsed in *Red Lion* grants the government limited authority to impose on broadcast licensees a *narrowly circumscribed* obligation to present contesting viewpoints from the electronic soapbox. But it does *not* authorize government to impose on licensees any obligation to present certain kinds of programming *beyond* these limited requirement of balanced public debate, however enlightened the government’s purposes may be. *See Columbia Broadcasting System, Inc. v. Democratic National Committee, supra*, 412 U.S. at 110 (“Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations.”). The Commission’s proposals would dictate to broadcasters significant elements of the mix and makeup of their programming schedules. This use of the government’s power “violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.” *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, supra*, 115 S.Ct. at 2347.

D. The Abstract Interest in Improving the Quality of Children’s Programming is Insufficient to Justify the Programming Requirements Contemplated by the Proposals

The constitutional infirmities of the affirmative programming requirements contemplated by the Commission’s proposals cannot be cured by citation to the Supreme

⁸ As eloquent as this statement would have been in any Supreme Court opinion, its force is accentuated for the purposes of these proceedings by the fact that the Court in *Hurley* drew extensively from *Turner Broadcasting* to support its holding. *See Hurley v. Irish American Gay, Lesbian, and Bisexual Group, supra*, 115 S.Ct. at 2848-50.

Court's holding in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), in which limited restrictions on indecent speech were upheld in part because of the accessibility of broadcast messages to children, or by general invocation of the importance of quality children's educational programming.

In *Pacifica* a plurality the Supreme Court sustained restrictions on indecent speech by relying in part on the rationale that "broadcasting is uniquely accessible to children," reciting "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household.'" *Id.* at 749. *Pacifica*, however, was explicitly grounded in a "nuisance" theory, in which the "nuisance," indecent speech, was channeled to times of day when children most likely would not be exposed to it. *Id.* at 731-32. Whatever the current vitality or reach of *Pacifica* today,⁹ it at most supports the Commission's authority to limit the exposure of children to a narrowly cabined category of indecent speech. It provides no support for affirmative requirements imposing on broadcasters actual obligations to attempt to reach children with certain defined types of programming.¹⁰

In the same vein, the decisions in *Action for Children's Television v. FCC*, 58 F.3d

⁹ Compare *Action for Children's Television v. FCC*, 58 F.3d 654, 659-60 (1995) (en banc) (applying the *Pacifica* rationale) with *Action for Children's Television v. FCC*, 58 F.3d 654, 673 (Edwards, J., dissenting) ("Whatever the merits of *Pacifica* when it was issued almost 20 years ago, it makes no sense now.").

¹⁰ *Pacifica*, it must be noted, was a mere plurality opinion, and as the Court has since observed, its holding was "emphatically narrow." *Sable Communications of Cal., Inc., v. FCC*, *supra*, 492 U.S. at 127.

654 (D.C. Cir. 1995), and *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995), cannot be extended to provide judicial endorsement for the Commission's proposals. Chairman Hundt recently cited these decisions for the proposition that "the government has a compelling interest in promoting the education and development of the nation's children." Chairman Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, Conference for the Second Century of the University of Pittsburgh School of Law, September 21, 1995, *supra*. Whether or not *ACT III* and *Alliance* stand the test of time or further review, their relevance to the Commission's current proposals is highly limited. If cited merely for the abstract and general point that government has at least a substantial interest in promoting children's programming, the decisions merely restate the obvious. For as to the general aspiration of improving the quantity and quality of children's programming, the constitutional issue is not the goal but the method of pursuit. *Cf. Texas v. Johnson*, 491 U.S. 397, 418 (1989) ("It is not the State's ends, but its means, to which we object."). Promotion of quality children's educational programming is undoubtedly a substantial governmental interest. Phrased at such a level of abstraction, Congress certainly had substantial justifications for enacting the Children's Television Act to encourage and foster educational children's programming.

When the First Amendment is implicated, however, such abstractions do not count. The question is not whether, in the abstract, the promotion of children's programming is a praiseworthy governmental goal, but whether the current Commission proposals are justified by a *specific* and *developed* record of a substantial need for *these* interventionist regulations and whether the regulations burden substantially more speech than is necessary to further

those needs. Again, *Turner Broadcasting* is especially instructive. The Court's disposition of *Turner Broadcasting* was driven by Justice Kennedy's concern that while the Congress may, in the abstract, have posited important interests to justify the must-carry rules at issue, under the First Amendment, more particularized demonstrations are required. *Turner Broadcasting, Inc., v. FCC, supra*, 114 S.Ct. at 2470 ("That the Government's asserted interests are important in the abstract does not mean, however, that the must-carry rules will in fact advance those interests. When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'") quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985). It is important to remember here that Justice Kennedy was applying the *intermediate scrutiny* standard--by hypothesis the minimum judicial standard applicable to the current Commission proposals--yet even under that intermediate standard merely abstract showings of need are insufficient. As Justice Kennedy noted, quoting the District of Columbia Court of Appeals: "[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."). *Turner Broadcasting, Inc. v. FCC, supra*, 114 S.Ct. at 2470, quoting *Home Box Office, Inc., v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977).

Given that under current doctrine only governmental interests directly springing from spectrum scarcity will be credited in analyzing whether an FCC regulation satisfies First Amendment strictures, there is ample basis for doubting that a palpable problem does exist. American children do spend a substantial amount of their time in front of the television set.

What they view on that set, however, originates from a wide variety of sources, including, as the record before the Commission demonstrates, cable channels such as Nickelodeon, The Family Channel, The Learning Channel, The Discovery Channel, MTV, Showtime, ESPN, The Disney Channel, TNT, and HBO, as well as the vast array of children's material available on video cassettes. *See Syracuse Peace Council v. FCC*, 867 F.2d 654, 684-85 (D.C. Cir., 1989), *cert. denied*, 493 U.S. 1019 (1990) (Starr, J., concurring) (arguing that the scarcity rationale of *Red Lion* has been undermined by technological and market developments, including the proliferation of non-broadcast media).

The FCC would clearly lack the statutory authority and constitutional power to presume to regulate the content of non-broadcast television programming. Yet it claims power to impose affirmative obligations on broadcasters. For the Commission to impose qualitative and quantitative content-based obligations on only one medium of expression is in serious tension with the First Amendment principle that "laws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State.'" *Turner Broadcasting System, Inc. v. FCC*, *supra*, 114 S.Ct. at 2458, *quoting Arkansas Writers' Project, Inc., v. Ragland*, 481 U.S. 221, 228 (1987).

Viewed in this context, *Act III* and *Alliance* do not offer meaningful support for the Commission's proposals. *Act III* is a derivative of *Pacifica*, and as water cannot rise higher than its source, the decision in *Act III* does no more than follow *Pacifica*'s holding that indecent speech may be channeled to certain times of the broadcast day. Like *Pacifica* itself, *Act III* provides no foundation for the far more intrusive regulatory step of imposing specific

affirmative programming requirements on broadcasters. And as the court in *Act III* itself pointed out, the ruling in *ACT III* was buttressed by the fact that it dealt with an act of Congress--not a regulatory policy undertaken by the Commission on its own. *Action for Children's Television v. FCC, supra*, 58 F.3d at 669 (“*Act I* involved an assessment of the constitutionality of channeling decisions that had been made by the FCC on its own initiative; here we are dealing with an act of Congress . . .”).¹¹

Reliance on *Alliance* is an even greater stretch. The first half of the court's holding in *Alliance*, upholding provisions of the Cable Television Consumer Protection and Competition Act of 1992 permitting cable operators to refuse to carry leased access programming involving indecent speech, was decided on “state action” grounds--the court holding that the return of discretion to cable operators did not constitute governmental action triggering the First Amendment. *Alliance for Community Media v. FCC, supra*, 56 F.3d at 113-21. Whatever the merits of this holding, a ruling based on the *autonomy* of cable operators as speakers under the First Amendment lends no plausible support to proposals by the Commission to impose affirmative programming operations on broadcasters. The second half of the court's ruling upheld statutory provisions and implementing regulations that effectively keep indecent programming out of the home unless a subscriber affirmatively requests it. As in *Act III*, this holding was based on the court's understanding of *Pacifica*, and on the court's perception that indecent programming on cable leased access channels

¹¹ The importance of explicit congressional authorization for Commission actions that impinge on First Amendment rights is discussed in detail in Part IV of this Statement, *infra*.

resembles broadcasting more than the dial-a-porn communications dealt with in *Sable Communications of California, Inc. v. FCC*, *supra*, 492 U.S. 115 (1989). In my judgment, both *ACT III* and *Alliance* are, at their core, out of step in their adherence to *Pacifica* and wrongly decided. Yet even if they are correct and endure, they at most authorize the channeling of indecent speech, not the forced production of speech deemed beneficial by the government.

Indeed, going beyond the *Pacifica* line of cases, whatever the long-term health of the *Red Lion* and its spectrum-scarcity rationale may be, for the Commission to attempt to stretch that rationale to justify affirmative programming obligations on one type of producer of children's programming in such a rich competitive environment not only portends overruling by the courts, it invites reconsideration and possible invalidation of the spectrum scarcity principle itself. As documented in the comments of the National Association of Broadcasters, the Commission has already received substantial evidence supporting the proposition that educational programming has actually *increased* significantly since the passage of the Children's Television Act and the Commission's last inquiry into this area. By its *own admission*, the most that the Commission is prepared to say at present is that *it does not know* whether the situation regarding children's programming is by its measure improving or deteriorating. *Notice of Proposed Rule Making*, MM Docket No. 93-48, at 11, ¶ 17 ("After careful review of these studies . . . we find that this evidence is insufficient to support a conclusion as to whether or not the educational and informational needs of children are being met, including whether the CTA and our existing regulations have precipitated a